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Yong Choo Kiong v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(L)-30–03 OF 2024(A)
WAN AHMAD FARID CHIEF JUSTICE, NORDIN HASSAN AND HANIPAH FARIKULLAH FCJJ
7 OCTOBER 2025

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Offence of rape — Whether invocation of procedures under s 265A(2) and (3) of Criminal Procedure Code ('the CPC') by trial judge for witnesses was invalid — Whether s 265A(2) and (3) of the CPC unconstitutional — Whether trial judge and Court of Appeal ('COA') failed to comply with s 182A of the CPC when they failed to consider appellant's statement under s 112 of the CPC — Whether trial judge and COA erred in finding that evidence of victim was credible and corroborated — Whether trial judge and COA erred when they failed to consider appellant's defence — Whether trial judge and COA failed to direct their minds that investigation by investigating officer was shoddy and incomplete — Whether appellant's application for admission of new evidence should be granted — Whether new evidence sought to be admitted was hearsay — Criminal Procedure Code ss 112, 182A, 265A(2) & (3) — Evidence Act 1950 ss 32(1)(c), 60 & 157 — Federal Constitution arts 5(1) & 8(1) — Penal Code s 376(1) — Witness Protection Act 2009 s 20(1)(a) & (b)

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The victim ('PW15'), an Indonesian national, was employed by the appellant as a maid at the appellant's house. PW15 alleged that on 7 July 2019, the appellant had raped her in the appellant's son's bedroom. The next day, on the advice given by PW3 and with the help of PW16, PW15 went to the police station and lodged a police report ('exh P52') stating that she was raped by the appellant. The appellant was charged under s 376(1) of the Penal Code for the offence of rape. Before testifying in court, PW15 and PW16 filed an application via the public prosecutor for their identities not to be disclosed under s 265A of the Criminal Procedure Code ('the CPC') and s 20(1)(a) and (b) of the Witness Protection Act 2009 (Act 696) and such application was allowed by the trial judge. In establishing their case, the prosecution relied on the evidence of the victim (PW15), and other corroborative evidence, among others, by PW3, Dr Nila Wati ('PW5'), PW16, PW15's diary ('P20A'), and the CCTV evidence. At the end of the prosecution's case, the court found the elements of the offence were satisfied and a prima facie case was established. In defence, the appellant denied raping PW15 and asserted that PW15 had invented the story that the appellant raped her merely to enable her to return home to Indonesia before the expiry of her contract of service. The appellant

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A also believed that there was a political ploy against him. At the end of the case, the trial judge found that the defence failed to raise any reasonable doubt on the prosecution's case. Therefore, the appellant was convicted of the offence of rape and was sentenced to 13 years of imprisonment and two strokes of the whip. On appeal, the Court of Appeal had affirmed the conviction but reduced the B imprisonment sentence to eight years. The appellant then filed the present appeal before the Federal Court. The appellant argued that the invocation of the procedures under s 265A(2) and (3) of the CPC by the trial judge for witnesses PW15 and PW16 was invalid and the provision was unconstitutional. The appellant further submitted that the trial judge and the C majority of the Court of Appeal: (a) had failed to comply with s 182A of the CPC when they failed to consider the appellant's statement under s 112 of the CPC (D107) ('the appellant's s 112 statement') in their decisions; (b) had erred in finding that the evidence of PW15 was credible and corroborated; (c) had erred when they failed to consider the appellant's defence; and (d) had failed to D direct their minds that the investigation by PW23 was shoddy and incomplete. The appellant had also sought the admission of new evidence, ie, the written statement ('SDT1') of an Indonesian lawyer known as Pathurrahman which contained a letter of statement of PW15 stating that PW15's evidence in the trial against the appellant, that she was raped by the appellant, was not true, E and she made up the story to enable her to return home to Indonesia before the expiry of her contract period.

Held, dismissing the appellant's appeal, affirming the conviction, and affirming the sentence imposed by the Court of Appeal:

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(1) The intention of Parliament in enacting s 265A of the CPC was clear that was, to protect the safety of witnesses by not disclosing their identity, and at the same time, encourage witnesses to testify in court for any offence. There was no duty or requirement under s 265A for the trial judge to give G any reasons, whether written or oral, before invoking the provision. In the present case, the procedure under s 265A of the CPC had been strictly complied with by the trial judge. The trial judge who had conducted the inquiry under s 265A(3) of the CPC was satisfied that there was a need for the identity of both PW15 and PW16 not to be disclosed and their H evidence to be taken in the manner as prescribed therein. In the circumstances, the court found that the invocation of s 265A by the trial judge was in accordance with the law (see paras 26, 28–30 & 39).

(2) The law, ie, s 265A(2) and (3) of the CPC, expressly provided that the inquiry was to be held without the presence of the accused and his I counsel. As there was a specific law that authorised the non-presence of the accused or his counsel at this inquiry stage, the issue of natural justice for the denial of the right to be heard did not arise. Furthermore, it was trite that the duty of the court was to implement the law as intended by Parliament through the wording of the law. Whether the law was harsh or

oppressive was to be discussed and resolved in Parliament and not for the court's determination, as this involved policy decisions and other considerations by the legislature. Therefore, the appellant's argument that the provision of s 265A of the CPC was oppressive and unreasonable was untenable (see paras 32, 34 & 37).

(3) It was trite principle of law that the right under art 5(1) of the Federal Constitution was not absolute and could be taken away by any provision of the law. Section 265A(2) and (3) of the CPC was validly passed by Parliament with plain and unambiguous provisions that authorised the absence of the accused and his counsel at the inquiry stage. Therefore, it was valid and constitutional. Further, since s 265A of the CPC was available to any prosecution's witnesses in a criminal trial, it was not discriminatory in nature, and did not infringe art 8(1) of the Federal Constitution. The inquiry process by the trial judge did not affect the rights of an accused person to defend himself, nor touched on his guilt. The evidence of PW15 and PW16 was also presented to the defence, and these witnesses were also subjected to cross-examination by the defence. There was no miscarriage of justice or prejudicial effect to the appellant. All the steps taken in the present case were in accordance with the law, and arts 5(1) and 8(1) of the Federal Constitution had not been breached. Therefore, the court found that s 265A(2) and (3) of the CPC was a good law, valid and constitutional (see paras 42, 46–47 & 49–50).

(4) What was pertinent for the court to consider was the appellant's evidence in court as his defence, which was tested in cross-examination and in the light of the totality evidence. After all, the substance of the appellant's s 112 statement (D107) was similar to his oral evidence in court. Hence, there was no miscarriage of justice or prejudicial effect to the appellant in the circumstances. The requirement of s 182A of the CPC had been complied with, and the omission to refer to the appellant's s 112 statement (D107) by the court was not fatal to the prosecution's case (see para 56).

(5) It was trite that an appeal was a continuation of a hearing, and an appellate court could review the whole evidence and make a finding even on an issue not decided by the trial judge. In the present case, the re-evaluation of evidence by the appellate court on all the evidence in the records of appeal disclosed that at the end of the case, all the evidence had been considered by the trial judge, even without mentioning the appellant's s 112 statement (D107) in his grounds of judgment. Here, the Court of Appeal found that s 182A of the CPC had been complied with, and the court agreed with the findings of both the trial judge and the majority of the Court of Appeal (see paras 59 & 61).

(6) In the present case, the trial judge found that PW15 was a credible witness based on the assessment of her demeanour, her conduct, and

tested it against the totality of corroborative evidence before the court. There were also concurrent findings on the credibility of PW15 by the trial judge and the majority of the Court of Appeal. Further, the contradictions of PW15's evidence or her conduct raised by the defence were not material that affect PW15's credibility. As such, there was no reason for the court to disturb the said findings (see paras 64 & 72).

(7) The court agreed with the concurrent findings of the High Court and the majority of the Court of Appeal that PW15's evidence was sufficiently corroborated by the following evidence: (a) the evidence of distress based on P20A as well as the testimonies by PW3, PW16 and DW3; (b) exh P52 which was PW15's former statement made to the police, an authority legally competent to investigate the facts pursuant to s 157 of the Evidence Act 1950; (c) P20A which constituted PW15's former statement that was consistent with the feelings of a rape victim; (d) the CCTV evidence which showed that the appellant was alone in the house with PW15, and this provided the opportunity for the appellant to commit the offence — although the evidence of opportunity per se could not amount to corroboration of PW15, but with other circumstantial evidence, it would lead to a reasonable inference that the offence had happened as testified by PW15; and (e) the admissible medical evidence of PW5 that corroborated the evidence of the offence of rape against PW15 (see paras 82, 86, 89, 91–92 & 95).

(8) Based on the notes of proceedings and the grounds of judgment of the trial judge and the majority of the Court of Appeal, the court found that the appellant's defence had been sufficiently considered. There were concurrent findings of the trial judge and the majority of the Court of Appeal that the appellant had failed in his defence to raise a reasonable doubt on the prosecution's case. The court agreed with these findings as the defence had failed to answer the evidence presented by the prosecution. It was trite that a credible defence, among others, was a defence that answered the evidence of the prosecution. In the present case, the appellant's defence, which included the appellant's testimony and other defence witnesses, did not raise a reasonable doubt as to the truth of the prosecution's evidence or the accused's guilt (see paras 96 & 98–99).

(9) Based on the totality of evidence presented to the court, and the analysis discussed earlier, the court agreed with the concurrent findings of the trial judge and the majority of the Court of Appeal that the elements of the charge under s 376(1) of the Penal Code against the appellant, that there was penetration and without PW15's consent, had been proven beyond a reasonable doubt. Therefore, the submission that the investigations by PW23 were shoddy and incomplete under the circumstances was untenable (see para 100).

(10) The rule against hearsay evidence had been codified in s 60 of the Evidence Act 1950. In the present case, considering that the purpose of adducing the additional evidence was to prove the truth of the contents of the statements, it clearly amounted to documentary hearsay, and the oral evidence of Pathurrahman informing what PW15 had told him was also hearsay evidence, which was inadmissible. In any event, the law provided exceptions to this hearsay evidence in s 32(1) of the Evidence Act 1950 but in the present case, the court found that the prerequisites of s 32(1)(c) had not been strictly proved. Further, the court also agreed with the finding of fact by the trial judge that the contents of the statement (SDT1) were not credible (see paras 103, 106–107, 111 & 113–114).

[Bahasa Malaysia summary

Mangsa ('PW15'), seorang warga Indonesia, telah diambil bekerja oleh perayu sebagai pembantu rumah di rumah perayu. PW15 mendakwa bahawa pada 7 Julai 2019, perayu telah merogolnya di dalam bilik tidur anak lelaki perayu. Keesokan harinya, atas nasihat yang diberikan oleh PW3 dan dengan bantuan PW16, PW15 telah pergi ke balai polis dan membuat laporan polis ('eksh P52') yang menyatakan bahawa dia telah dirogol oleh perayu. Perayu telah dituduh di bawah s 376(1) Kanun Keseksaan atas kesalahan rogol. Sebelum memberi keterangan di mahkamah, PW15 dan PW16 memfailkan permohonan melalui pendakwa raya agar identiti mereka tidak didedahkan di bawah s 265A Kanun Tatacara Jenayah ('KTJ') dan s 20(1)(a) dan (b) Akta Perlindungan Saksi 2009 (Akta 696) dan permohonan tersebut telah dibenarkan oleh hakim bicara. Dalam membuktikan kes mereka, pihak pendakwaan bergantung pada keterangan mangsa (PW15), dan keterangan sokongan lain, antara lain, oleh PW3, Dr Nila Wati ('PW5'), PW16, diari PW15 ('P20A'), dan bukti CCTV. Pada akhir kes pendakwaan, mahkamah mendapati elemen-elemen kesalahan telah dipenuhi dan kes prima facie telah dibuktikan. Dalam pembelaannya, perayu menafikan telah merogol PW15 dan menegaskan bahawa PW15 telah mereka-reka cerita bahawa perayu merogolnya hanya untuk membolehkannya pulang ke Indonesia sebelum tamat kontrak perkhidmatannya. Perayu juga percaya bahawa terdapat muslihat politik terhadapnya. Pada akhir kes, hakim bicara mendapati bahawa pihak pembelaan gagal menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan. Oleh itu, perayu disabitkan dengan kesalahan rogol dan dijatuhkan hukuman penjara 13 tahun dan dua sebatan. Semasa rayuan, Mahkamah Rayuan telah mengesahkan sabitan tetapi mengurangkan hukuman penjara kepada lapan tahun. Perayu kemudiannya memfailkan rayuan semasa di Mahkamah Persekutuan. Perayu berhujah bahawa penggunaan prosedur di bawah s 265A(2) dan (3) KTJ oleh hakim bicara untuk saksi PW15 dan PW16 adalah tidak sah dan peruntukan tersebut tidak berperlembagaan. Perayu selanjutnya berhujah bahawa hakim bicara dan majoriti Mahkamah Rayuan: (a) telah gagal mematuhi s 182A KTJ apabila mereka gagal mempertimbangkan pernyataan perayu di bawah s 112 KTJ

(D107) ('pernyataan s 112 perayu') dalam keputusan mereka; (b) telah terkhilaf dalam mendapati bahawa keterangan PW15 adalah boleh dipercayai dan disokong; (c) telah terkhilaf apabila mereka gagal mempertimbangkan pembelaan perayu; dan (d) telah gagal mengarahkan fikiran mereka bahawa siasatan oleh PW23 adalah tidak berkualiti dan tidak lengkap. Perayu juga telah memohon untuk penerimaan keterangan baharu, iaitu, pernyataan bertulis ('SDT1') seorang peguam Indonesia yang dikenali sebagai Pathurrahman yang mengandungi surat pernyataan PW15 yang menyatakan bahawa keterangan PW15 dalam perbicaraan terhadap perayu, bahawa dia telah dirogol oleh perayu, adalah tidak benar, dan dia mereka-reka cerita tersebut untuk membolehkannya pulang ke Indonesia sebelum tamat tempoh kontraknya.

Diputuskan, menolak rayuan perayu, mengesahkan sabitan, dan mengesahkan hukuman yang dijatuhkan oleh Mahkamah Rayuan:

(1) Hasrat Parlimen dalam menggubal s 265A KTJ adalah jelas iaitu untuk melindungi keselamatan saksi-saksi dengan tidak mendedahkan identiti mereka, dan pada masa yang sama, menggalakkan saksi untuk memberi keterangan di mahkamah berkenaan apa-apa kesalahan. Tiada kewajipan atau keperluan di bawah s 265A untuk hakim bicara memberikan apa-apa alasan, sama ada bertulis atau lisan, sebelum menggunakan peruntukan tersebut. Dalam kes semasa, prosedur di bawah s 265A KTJ telah dipatuhi sepenuhnya oleh hakim bicara. Hakim bicara yang telah menjalankan siasatan di bawah s 265A(3) KTJ berpuas hati bahawa terdapat keperluan untuk identiti kedua-dua PW15 dan PW16 tidak didedahkan dan keterangan mereka diambil mengikut cara yang ditetapkan di dalamnya. Dalam keadaan tersebut, mahkamah mendapati bahawa penggunaan s 265A oleh hakim bicara adalah bertepatan dengan undang-undang (lihat perenggan 26, 28–30 & 39).

(2) Undang-undang, iaitu s 265A(2) dan (3) KTJ, dengan jelas memperuntukkan bahawa siasatan hendaklah diadakan tanpa kehadiran tertuduh dan peguamnya. Memandangkan terdapat undang-undang khusus yang membenarkan ketiadaan tertuduh atau peguamnya pada peringkat siasatan ini, isu keadilan semula jadi bagi penafian hak untuk didengar tidak timbul. Tambahan pula, adalah jelas bahawa tugas mahkamah adalah untuk melaksanakan undang-undang seperti yang dimaksudkan oleh Parlimen melalui susunan kata undang-undang. Sama ada undang-undang tersebut keras atau menindas hendaklah dibincangkan dan diselesaikan di Parlimen dan bukan untuk penentuan mahkamah, kerana ini melibatkan keputusan dasar dan pertimbangan-pertimbangan lain oleh badan perundangan. Oleh itu, hujah perayu bahawa peruntukan s 265A KTJ adalah menindas dan tidak munasabah adalah tidak dapat dipertahankan (lihat perenggan 32, 34 & 37).

(3) Adalah menjadi prinsip undang-undang yang mantap bahawa hak di bawah perkara 5(1) Perlembagaan Persekutuan tidak mutlak dan boleh dilucutkan oleh mana-mana peruntukan undang-undang. Seksyen 265A(2) dan (3) KTJ telah diluluskan secara sah oleh Parlimen dengan peruntukan yang nyata dan jelas yang membenarkan ketidakhadiran tertuduh dan peguamnya pada peringkat siasatan. Oleh itu, ia adalah sah dan berperlembagaan. Tambahan pula, memandangkan s 265A KTJ tersedia untuk mana-mana saksi pendakwaan dalam perbicaraan jenayah, ia tidak bersifat diskriminasi, dan tidak melanggar perkara 8(1) Perlembagaan Persekutuan. Proses siasatan oleh hakim bicara tidak menjejaskan hak tertuduh untuk membela diri, mahupun menyentuh kesalahannya. Keterangan PW15 dan PW16 juga dikemukakan kepada pihak pembelaan, dan saksi-saksi ini juga tertakluk kepada pemeriksaan balas oleh pihak pembelaan. Tiada salah laksana keadilan atau kesan prejudis kepada perayu. Semua langkah yang diambil dalam kes semasa adalah selaras dengan undang-undang, dan perkara 5(1) dan 8(1) Perlembagaan Persekutuan tidak dilanggar. Oleh itu, mahkamah mendapati bahawa s 265A(2) dan (3) KTJ adalah undang-undang yang baik, sah dan berperlembagaan (lihat perenggan 42, 46–47 & 49–50).

(4) Apa yang penting untuk dipertimbangkan oleh mahkamah ialah keterangan perayu di mahkamah sebagai pembelaannya, yang diuji dalam pemeriksaan balas dan berdasarkan keseluruhan keterangan. Lagipun, inti pati pernyataan s 112 (D107) perayu adalah serupa dengan keterangan lisannya di mahkamah. Oleh itu, tiada salah laksana keadilan atau kesan prejudis kepada perayu dalam keadaan tersebut. Keperluan s 182A KTJ telah dipatuhi, dan peninggalan untuk merujuk kepada pernyataan s 112 (D107) perayu oleh mahkamah tidak membawa mudarat kepada kes pendakwaan (lihat perenggan 56).

(5) Adalah jelas bahawa rayuan merupakan kesinambungan perbicaraan, dan mahkamah rayuan boleh menyemak semula keseluruhan keterangan dan membuat keputusan walaupun mengenai isu yang tidak diputuskan oleh hakim bicara. Dalam kes semasa, penilaian semula keterangan oleh mahkamah rayuan ke atas semua keterangan dalam rekod rayuan mendedahkan bahawa pada akhir kes, semua keterangan telah dipertimbangkan oleh hakim bicara, walaupun tanpa menyebut pernyataan s 112 (D107) perayu dalam alasan penghakimannya. Di sini, Mahkamah Rayuan mendapati bahawa s 182A KTJ telah dipatuhi, dan mahkamah bersetuju dengan dapatan hakim bicara dan majoriti Mahkamah Rayuan (lihat perenggan 59 & 61).

(6) Dalam kes semasa, hakim bicara mendapati bahawa PW15 adalah saksi yang boleh dipercayai berdasarkan penilaian sikap, kelakuannya, dan mengujinya terhadap keseluruhan keterangan sokongan di hadapan mahkamah. Terdapat juga dapatan yang sama mengenai kredibiliti

PW15 oleh hakim bicara dan majoriti Mahkamah Rayuan. Tambahan pula, percanggahan keterangan PW15 atau kelakuannya yang dibangkitkan oleh pihak pembelaan bukanlah material yang menjejaskan kredibiliti PW15. Oleh itu, tiada sebab untuk mahkamah mengganggu dapatan tersebut (lihat perenggan 64 & 72).

(7) Mahkamah bersetuju dengan dapatan yang sama oleh Mahkamah Tinggi dan majoriti Mahkamah Rayuan bahawa keterangan PW15 telah disokong secukupnya oleh keterangan berikut: (a) keterangan tentang tekanan berdasarkan P20A serta keterangan oleh PW3, PW16 dan DW3; (b) eksh P52 yang merupakan pernyataan terdahulu PW15 yang dibuat kepada polis, pihak berkuasa yang kompeten di sisi undang-undang untuk menyiasat fakta menurut s 157 Akta Keterangan 1950; (c) P20A yang merupakan pernyataan terdahulu PW15 yang selaras dengan perasaan mangsa rogol; (d) bukti CCTV yang menunjukkan bahawa perayu bersendirian di dalam rumah bersama PW15, dan ini memberi peluang kepada perayu untuk melakukan kesalahan tersebut — walaupun keterangan tentang peluang itu sendiri tidak boleh dianggap sebagai sokongan kepada PW15, tetapi dengan keterangan mengikut keadaan yang lain, ia akan membawa kepada inferens yang munasabah bahawa kesalahan tersebut telah berlaku seperti yang dinyatakan oleh PW15; dan (e) keterangan perubatan PW5 yang boleh diterima yang menyokong keterangan kesalahan rogol terhadap PW15 (lihat perenggan 82, 86, 89, 91–92 & 95).

(8) Berdasarkan nota prosiding dan alasan penghakiman hakim bicara dan majoriti Mahkamah Rayuan, mahkamah mendapati bahawa pembelaan perayu telah dipertimbangkan dengan secukupnya. Terdapat dapatan yang sama oleh hakim bicara dan majoriti Mahkamah Rayuan bahawa perayu telah gagal dalam pembelaannya untuk menimbulkan keraguan munasabah terhadap kes pendakwaan. Mahkamah bersetuju dengan dapatan ini kerana pihak pembelaan telah gagal menjawab keterangan yang dikemukakan oleh pihak pendakwaan. Adalah jelas bahawa pembelaan yang boleh dipercayai, antara lain, adalah pembelaan yang menjawab keterangan pihak pendakwaan. Dalam kes semasa, pembelaan perayu, yang merangkumi keterangan perayu dan saksi-saksi pembelaan lain, tidak menimbulkan keraguan munasabah tentang kebenaran keterangan pendakwaan atau kebersalahan tertuduh (lihat perenggan 96 & 98–99).

(9) Berdasarkan keseluruhan keterangan yang dikemukakan kepada mahkamah, dan analisis yang dibincangkan sebelum ini, mahkamah bersetuju dengan dapatan yang sama oleh hakim bicara dan majoriti Mahkamah Rayuan bahawa elemen-elemen pertuduhan di bawah s 376(1) Kanun Keseksaan terhadap perayu, bahawa terdapat penetrasi dan tanpa persetujuan PW15, telah dibuktikan tanpa keraguan yang

munasabah. Oleh itu, hujah bahawa siasatan oleh PW23 adalah tidak berkualiti dan tidak lengkap dalam keadaan tersebut adalah tidak boleh dipertahankan (lihat perenggan 100).

(10) Peraturan terhadap keterangan dengar cakap telah dikodifikasikan dalam s 60 Akta Keterangan 1950. Dalam kes semasa, memandangkan tujuan mengemukakan keterangan tambahan tersebut adalah untuk membuktikan kebenaran kandungan pernyataan tersebut, ia jelas merupakan dengar cakap dokumentar, dan keterangan lisan Pathurrahman yang memaklumkan apa yang PW15 beritahu kepadanya juga merupakan keterangan dengar cakap, yang tidak boleh diterima. Walau apa pun, undang-undang memperuntukkan pengecualian kepada keterangan dengar cakap ini dalam s 32(1) Akta Keterangan 1950 tetapi dalam kes semasa, mahkamah mendapati bahawa prasyarat s 32(1)(c) tidak dibuktikan dengan secukupnya. Tambahan pula, mahkamah juga bersetuju dengan dapatan fakta oleh hakim bicara bahawa kandungan pernyataan (SDT1) tersebut tidak boleh dipercayai (lihat perenggan 103, 106–107, 111 & 113–114).]

Cases referred to

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PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273; [1981] CLJ 39, FC (refd)
PP v Adetunji Adeleye Sule [1993] 2 MLJ 70, SC (refd)
PP v Chan Kim Choi [1989] 1 MLJ 404, HC (refd)
PP v Samsul Kamar bin Mohd Zain [1988] 2 MLJ 252 (refd)
PP v Yee Kim Seng [1983] 1 MLJ 252; [1983] CLJ Rep 824 (refd)
R v Hills (1987) 86 Cr App Rep 26, CA (refd)
Rex v Velayuthan [1935] 1 MLJ 277 (refd)
Ratten v R [1972] AC 378, PC (refd)
Ridley v Whipp (1916) 22 CLR 381, HC (refd)
Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd [2010] 4 MLJ 483; [2010] 3 CLJ 779, FC (refd)
Sathya Vello v PP [2022] 4 MLJ 111, FC (folld)
Sim Tiew Bee v PP [1973] 2 MLJ 200, FC (refd)
Subramaniam v PP [1956] 1 MLJ 220, PC (refd)
Tang Kin Seng v PP [1996] SCD 174; [1996] 3 SLR(R) 444, HC (refd)
Teper v The Queen [1952] AC 480 (refd)
TN Nathan v PP [1978] 1 MLJ 134 (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2019] 5 CLJ 479, FC (refd)
Yap Ee Kong & Anor v PP [1981] 1 MLJ 144, FC (refd)
Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals [2021] 1 MLJ 478; [2021] 1 CLJ 631, FC (refd)

Legislation referred to

Criminal Procedure Code ss 112, 182A, 182A(1), 265(1), 265A, 265A(2), (3), (6)
Evidence Act 1950 ss 32(1), (1)(c), 60, 157
Federal Constitution arts 5, 5(1), 8, 8(1)
Immigration Act 1959/63 s 59
Penal Code s 376(1)
Security Offences (Special Measures) Act 2012 ss 14, 15, 16

Witness Protection Act 2009 s 20(1)(a), (1)(b)

Appeal from: *Yong Choo Kiong v Public Prosecutor* [2024] 3 MLJ 779 (Court of Appeal, Putrajaya)

Hisyam Abdullah @ Teh Poh Teik (with Low Wei Loke, Siti Summaiyah Ahmad Jaafar, Kee Wei Lon and Ee Gen You) (Hisyam Teh), Rajpal Singh a/l Mukhtiar Singh (with Tiew Poh Nee) (Rajpal, Firah & Vishnu); and Salim Bashir Bhaskaran (Salim Bashir, Ruswiza & Co) for the appellant.

Mohd Amril Johari (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Nordin Hassan FCJ:

INTRODUCTION

[1] The appellant is appealing against the majority decision of the Court of Appeal in affirming the decision of the trial judge that convicted the appellant for an offence of rape under s 376(1) of the Penal Code. The High Court, after convicting the appellant, has sentenced him to 13 years imprisonment and two strokes of the whip. The majority of the Court of Appeal, however, reduced the sentence to eight years imprisonment and maintained the two strokes of whipping.

[2] The charge against the appellant reads as follows:

> Bahawa kamu pada 7 Julai 2019 di antara jam lebih kurang 8:15 malam hingga 9:15 malam, di dalam sebuah bilik di tingkat atas dalam rumah No.52, Jalan Desa Meru 2, Meru Desa Park, Bandar Meru Jaya, 30020 Ipoh, di dalam daerah Kinta, di dalam negeri Perak telah melakukan rogol terhadap Awang (No. Pasport: AU Xxx) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 376(1) Kanun Keseksaan.

THE APPLICATION BY PW15 AND PW16 FOR THEIR IDENTITIES NOT TO BE DISCLOSED UNDER S 265A OF THE CRIMINAL PROCEDURE CODE ('THE CPC')

[3] Before PW15 and PW16 testified in court, they made an application through the public prosecutor for their identities not to be disclosed pursuant to s 265A of the CPC. The trial judge, after conducting an inquiry on 10 June 2021, was satisfied that there was a need to protect the identities of PW15 and PW16 and, as such, allowed their applications under s 265A of the CPC and s 20(1)(a) and (b) of the Witness Protection Act 2009.

A THE PROSECUTION CASE

[4] The prosecution established its case on the evidence of its main witness, the victim, PW15 (protected witness), and other corroborative evidence, among others, by Riki Sapari ('PW3'), Dr Nila Wati ('PW5'), PW16 (protected witness), PW15's diary ('P20A'), and the CCTV evidence.

[5] The main witness, PW15, an Indonesian national, testified in court that on 8 May 2019, she was employed as a maid at the appellant's house. During the period of his employment, PW15 was sexually harassed by the appellant three times before the rape incident. The appellant also threatened PW15 not to inform his wife ('DW2') about his conduct towards PW15, or if not, both of them will die, but PW15 will die first.

[6] On 7 July 2019, at about 8pm, whilst PW15 was ironing clothes in Bryan's room, the appellant's son, the appellant, entered the room and thereafter closed the wooden blind. The appellant then pulled PW15's hand and moved towards the bed. PW15 resisted the appellant's action and said 'lepaslah', but the appellant responded 'teriaklah, tiada siapa yang dengar', and PW15 was pushed onto the bed by the appellant. The appellant then placed his body on top of PW15 while PW15 tried to push the appellant away, but failed. Her attempt to escape was also unsuccessful. While PW15 was lying on the bed, the appellant held both of PW15's hands with his left hand and placed them on her head. The appellant then, using his right hand, took off PW15's pants and panties and inserted his penis into PW15's vagina for about two to three minutes. After a while, PW15 managed to push the appellant's body and ran to the bathroom, but was followed by the appellant, who then fondled her. PW15 then pushed the appellant out of the bathroom and locked the door. PW15 heard the appellant knock several times on the bathroom door, but PW15 refused to open it. After the knocking on the door stopped, PW15 stayed quietly in the toilet to calm herself and then washed her private parts. PW15 thereafter went out of the bathroom to continue with her work. PW15 did not sleep that night but cried and wrote in her personal diary ('P20A').

[7] The next day of the incident, on 8 July 2025, PW15 made three telephone calls to Riki Sapari ('PW3'), an employee with 'Bahagian Tenaga Kerja KBRI', informing him about the incident that she was raped by her employer. PW3 testified that during the telephone conversations, PW15, in a state of panic, cried and asked her to be saved several times. PW3 then requested her to go to the nearest police station.

[8] On the same day, 8 July 2019, at about 1.15pm, PW15 stopped a car driven by PW16 and requested him to send her to the Indonesian Embassy in Kuala Lumpur. PW16, who was unable to send her to Kuala Lumpur, had

instead sent her to a taxi stand at Amanjaya, Ipoh. However, PW15 then informed him that she had been raped by her employer and started crying. Hearing this, PW16 brought PW15 to the Jelapang Police Station for PW15 to lodge a police report, which she did. In her police report ('P52'), PW15 mentioned that on 7 July 2019, she was raped by the appellant in the appellant's house at about 9pm.

[9] PW15 also wrote in her personal diary ('P20A'), 'Aku benci diriku' (I hate myself), and during the trial, when asked why she wrote those words, she answered that she feels 'kotor, jijik dan hina' (dirty, disgusting, and humiliated).

[10] Two days after the incident, on 9 July 2019, PW15 was examined by Dr Nila Wati ('PW5') at Ipoh General Hospital, where PW5 found there were fresh tears at 6 to 8 o'clock of the hymen that occurred less than 72 hours from the time of the examination. PW5 also did not rule out that the fresh tears could be caused by penile penetration.

[11] The CCTV evidence presented by the prosecution also shows that the appellant was alone with PW15 in the house at the time of the incident.

THE DECISION OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION CASE

[12] The trial judge, having considered the evidence adduced by PW15 and her demeanour in court and the totality of the prosecution evidence, found that PW15 is a credible witness and her evidence is convincing. In the grounds of judgment, the judge said this on the assessment of PW15's credibility at the end of the prosecution case:

> [66] Dalam kes ini, mahkamah mendapati SP15 adalah seorang saksi yang kredibel dan keterangannya adalah meyakinkan. Malah keterangannya disokong oleh keterangan pegawai perubatan O&G iaitu SP5 dan juga disokong oleh keterangan saksi-saksi lain termasuk keterangan dokumentar.

[13] The trial judge also found that the prosecution had proved all the elements of the offence of rape against the appellant, which are penile penetration and the absence of PW15's consent. Hence, the trial judge concluded that the prosecution had succeeded in proving a prima facie case for the offence of rape under s 376(1) of the Penal Code against the accused.

[14] The appellant, in his defence under oath, essentially denied raping PW15 and asserted that PW15 had invented the story that the appellant raped her merely to enable her to return home to Indonesia before the expiry of her

A contract of service. The appellant also believed that there was a political ploy against him.

[15] After analysing the defence case and assessing it in light of the totality of evidence before the court, the trial judge found that the defence had failed to raise any reasonable doubt on the prosecution's case. Therefore, the appellant was convicted of the offence of rape as charged. The appellant was then sentenced to 13 years of imprisonment and two strokes of the whip.

C THE PROCEEDINGS AT THE COURT OF APPEAL

[16] The aggrieved appellant then filed an appeal to the Court of Appeal against the decision of the trial judge. The main grounds of the appeal are as follows:

D (a) the trial judge erred in invoking s 265A of the CPC concerning PW15 and PW16;

(b) the trial judge erred in accepting the evidence of PW15 as credible and corroborated;

E (c) the trial judge failed to direct his mind that the investigations of PW23 were shoddy and incomplete; and

(d) the trial judge failed to consider the defence of the appellant.

F **[17]** Having analysed the evidence and heard the submissions by parties, the majority of the Court of Appeal held that the grounds for the appeal were without merit and untenable. Therefore, the decision of the trial judge in convicting the appellant of the rape charge was affirmed, however, the sentence was reduced to eight years of imprisonment, and the two strokes of whipping were maintained.

[18] In coming to the decision, the majority of the Court of Appeal accepted the finding of the trial judge that PW15 was a credible witness. In the grounds of judgment, the majority of the Court of Appeal states as follows:

H

> [22] We are of the considered opinion that the learned trial judge had not erred in his finding that PW15 is a credible witness. There has been a clear finding of facts made by the learned trial judge based on the hearing of the witnesses and considering all the evidence tendered. We are of the view that the learned trial judge is the one who had the audio and visual advantage to observe the demeanour of witnesses. Hence, he was clearly entitled to make findings about the credibility of the witnesses. As an appellate court, we should be slow to interfere with such findings unless it can be shown before us that the findings were perverse and against all available evidence. In the present case, we see no reason to disturb the finding of the trial judge.

I

[19] It was the finding of the majority of the Court of Appeal that the conviction against the appellant for the offence of rape under s 376(1) of the Penal Code is safe and, as such, affirmed the conviction by the trial judge.

THE APPEAL BEFORE THIS COURT

[20] Dissatisfied with the decision of the majority of the Court of Appeal in affirming the conviction by the trial judge against the appellant, the present appeal is before this court. It is a trite law that an appellate court will not interfere with a conviction unless the balance of evidence is grossly against the conviction, and the prosecution's evidence, assessed in the totality of the evidence, has failed to prove the case beyond a reasonable doubt. In other words, the trial judge is plainly wrong in his decision on fact-finding and assessment of evidence.

(See also *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 (FC).)

[21] The issues raised by counsel for the appellant in the present appeal are as follows:

(a) the invocation of the procedures under s 265A(2) and (3) of the CPC by the trial judge for witnesses PW15 and PW16 was invalid and the provision is unconstitutional;

(b) the trial judge and the majority of the Court of Appeal have failed to comply with s 182A of the CPC when they failed to consider the appellant's statement under s 112 of the CPC (D107) ('the 112 statement') in their decisions;

(c) the trial judge and the majority of the Court of Appeal erred in finding that the evidence of PW15 was credible;

(d) the trial judge and the majority of the Court of Appeal also erred in their finding that the evidence of PW15 was corroborated;

(e) the trial judge and the majority of the Court of Appeal also erred when they failed to consider the appellant's defence; and

(f) the trial judge and the majority of the Court of Appeal also failed to direct their minds that the investigation by PW23 was shoddy and incomplete.

The invocation of the procedures of s 265A(2) and (3) of the CPC by the trial judge for witnesses PW15 and PW16 was invalid, and whether the provision is unconstitutional

[22] On this issue, counsel for the appellant submitted that the denial of the

appellant's right to be heard at the inquiry stage as provided under s 265A(2) and (3) of the CPC constitutes a direct violation of the principles of natural justice entrenched under arts 5 and 8 of the Federal Constitution ('the FC'). Furthermore, the said denial of the appellant's right is oppressive and unreasonable in nature and intrudes into the fundamental liberty enshrined in the said arts 5 and 8 of the FC. Moreover, the procedures under s 265A(2) and (3) are said to be unduly harsh and unfair to the appellant.

[23] As regards to this issue, s 265A of the CPC is a special provision enacted by Parliament for the purpose of protecting prosecution witnesses and encouraging witnesses to testify in court. Any witness for the prosecution who refuses to have his identity disclosed and wishes to testify in a manner that he would not be seen or heard by the accused and his counsel may make an application to the court under s 265(1) through the public prosecutor. A similar provision is also provided under s 20(1)(a) and (b) of the Witness Protection Act 2009, and ss 14, 15, and 16 of the Security Offences (Special Measures) Act 2012.

[24] For ease of reference, s 265A of the CPC is as follows:

> 265A Special provisions relating to protected witness
>
> (1) Notwithstanding section 264, *where at any time during any trial, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the Court for the procedures in this section to apply.*
>
> (2) For the purpose of satisfying itself as to the need to protect the identity of the witness, *the Court shall hold an inquiry in camera by questioning the witnesses concerned or any other witness in the absence of the accused and his counsel.*
>
> (3) *If after such inquiry the Court is satisfied as to the need to protect the identity of the witness*, the evidence of such witness shall be given in such a manner *that the witness would not be visible to the accused and his counsel and further if the witness fears that his voice may be recognised, his evidence shall be given in such manner that he would not be heard by the accused and his counsel.*
>
> (4) The evidence given by the witness under subsection (3) shall be given to the accused and his counsel, provided that the Court shall cause the evidence leading to the identity of the witness to be concealed.
>
> (5) The Court shall disallow any question by the accused or his counsel to any other witness that would lead to the identification of the witness who has given his evidence under this section.
>
> (6) *Where a witness gives evidence in accordance with this section, he shall, for the purposes of this Code and the Evidence Act, be deemed to be giving evidence in the presence of the Court, the accused person, and his counsel.*

(7) The Court shall seal all records that may lead to the identification of the witness who has given evidence under this section. (Emphasis added.)

[25] Section 265A of the CPC is unambiguous in that the granting of the said application is not a matter of right of the witness. The court shall conduct an inquiry to determine whether the witness's identity needs to be protected. Upon the satisfaction of the court, then only then the application may be granted as provided under s 265A(2) and (3). Further, when a witness gives evidence in accordance with this section, he, for the purpose of the CPC and the Evidence Act 1950, is deemed to be giving evidence in the presence of the court, the accused, and his counsel as provided under s 265A(6) of the same Code.

[26] In the present case, the procedure under s 265A of the CPC has been strictly complied with by the trial judge. Upon an inquiry held on 10 June 2021, the trial judge was satisfied that there was a need to protect the identity of PW15 and PW16. As such, the applications by PW15 and PW16 were granted under s 265A of the CPC and also pursuant to s 20(1)(a) and (b) of the Witness Protection Act 2009. This is reflected in the record of appeal Vol 2, encl 6, p 108, where the trial judge states:

Hasil siasatan atau inkuiri yang dijalankan pada 10 Jun 2021, saya berpendapat adanya keperluan untuk identiti kedua-dua saksi terlindung ini dilindungi sebagaimana kehendak seksyen 20(1)(a) dan (b) Akta Perlindungan Saksi 2009 dan seksyen 265A Kanun Acara Jenayah.

[27] This special provision of s 265A of the CPC mandates that the inquiry by the trial judge be held without the presence or participation of the accused and his counsel, as the objective is for the trial judge to determine whether the identity of a witness should or should not be disclosed. Otherwise, it defeats the purpose of the provision if the identity of a witness is disclosed at the inquiry stage to the other party. Even if the identity of the witness is already known to the accused or any other person, it does not mean that s 265A is inapplicable. The protection of a witness must be assessed holistically, and under the law, that responsibility is given to the trial judge to determine.

[28] The intention of Parliament in enacting s 265A is clear that is, to protect the safety of witnesses by not disclosing their identity, and at the same time, encourage witnesses to testify in court for any offence. This is reflected in the speech by the Minister in the Prime Minister's Department, Puan Hjh Nancy bt Shukri, in Parliament on 17 May 2016 and reported in Hansard as follows:

Fasal 7 bertujuan untuk memasukkan seksyen baru 265A, 265B dan 265C. Seksyen baru ini mengadakan peruntukan bagi saksi yang dilindungi diambil melalui

tatacara khas. Pindaan ini dicadangkan bagi *menangani masalah keengganan saksi untuk memberi keterangan di mahkamah kerana bimbang keselamatan dirinya jika identitinya didedahkan terutamanya dalam kes-kes yang melibatkan kumpulan jenayah terancang*. Dengan peruntukan baru yang dicadangkan itu *akan lebih ramai saksi berani untuk tampil memberikan keterangan terhadap apa-apa pertuduhan di mahkamah termasuklah terhadap anggota kumpulan jenayah terancang* dan dengan keterangan itu, maka sabitan dapat dikenakan terhadap mereka yang melakukan jenayah. (Emphasis added.)

[29] Reverting to the present case, the trial judge who has conducted the inquiry under s 265A(3) was satisfied that there was a need for the identity of both PW15 and PW16 not to be disclosed and their evidence to be taken in the manner as prescribed therein.

[30] In the circumstances, we find that the invocation of s 265A by the trial judge in the present case was in accordance with the law.

[31] On this issue, it is also trite that the principle of natural justice means the right to be heard and the right to an unbiased decision-maker.

(See *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals* [2021] 1 MLJ 478; [2021] 1 CLJ 631 (FC); *Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd* [2010] 4 MLJ 483; [2010] 3 CLJ 779 (FC); *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2019] 5 CLJ 479 (FC).)

[32] However, under s 265A(2) and (3), there is no right for the accused to be heard at the inquiry stage, which is only to determine whether the prosecution's witness needs to be protected by not revealing their identity. The law expressly provides that the inquiry is to be held without the presence of the accused and his counsel. As there is a specific law that authorises the non-presence of the accused or his counsel at this inquiry stage, the issue of natural justice for the denial of the right to be heard does not arise.

[33] This court in *Bird Dominic Jude v Public Prosecutor* [2014] 3 MLJ 745; [2014] 4 CLJ 133 has touched on this principle of law in the following manner:

[16] As regards the appellant's contention on the unconstitutionality of s 56A of the CJA, which allows the prosecution to effect his arrest and subsequent detention after his acquittal by the High Court and thereby violating his constitutional rights as guaranteed by arts 5(1) and 8(1) of the FC, with respect, *we could not agree with such a contention. On this issue, the question is whether there is a specific law authorising such deprivation of the applicant's personal liberties* (*see the case of Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372; [2002] 5 CLJ 156). *It is also to be noted that*

art 5(1) of the FC provides as follows:

> *No person shall be deprived of his life or personal liberty save in accordance with law.* (Emphasis added.)

(See also *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147 (FC).)

[34] Next, it is also a trite law that the duty of the court is to implement the law as intended by Parliament through the wording of the law. Whether the law is harsh or oppressive is to be discussed and resolved in Parliament and not for the court's determination, as this involves policy decisions and other considerations by the Legislature.

[35] In *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC), Raja Azlan Shah (as His Highness then was) said this:

> *The question whether the impugned Act is 'harsh' or 'unjust' is a question of policy to be debated and decided by Parliament, and therefore not met for judicial determination.* To sustain it would cut very deeply into the very being of Parliament. (Emphasis added.)

[36] This court in *Public Prosecutor v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273; [1981] CLJ 39, further explained as follows:

> The words of Lord Diplock in an authority cited by my Lord President, *Duport Steel, Duport Steels Ltd v Sirs*, seem to me to be particularly apt, *for the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention, what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.* (Emphasis added.)

[37] Therefore, the submission by counsel for the appellant that the provision of s 265A of the CPC is oppressive and unreasonable is untenable.

[38] Counsel for the appellant also submitted that the trial judge had failed to provide any reasons for allowing the applications by PW15 and PW16 under s 265A of the CPC.

[39] In this regard, the provision of s 265A(2) only requires the trial judge to conduct the inquiry to determine whether the witness or witnesses need to be protected. The decision to protect the witness depends on the satisfaction of the trial judge at the conclusion of the inquiry, as provided under s 265A(3).

There is no duty or requirement under s 265A for the trial judge to give any reasons, whether written or oral, before invoking the provision. This is more so as in an application under s 265A, the trial judge needs to determine whether the witness should be protected and his identity should or should not be disclosed. The information gathered by the trial judge, including the reason for allowing the application, must also not be disclosed. Any reasons given by the trial judge on the decision of the inquiry to the other party, directly or indirectly, may compromise the identity of the protected witness.

The constitutionality of s 265A(2) and (3) of the CPC

[40] The other related issue here is whether the provision of ss 265A(2) and (3) are unconstitutional. In the present case, the appellant has challenged the constitutionality of s 265A(2) and (3) on the ground that the appellant and his counsel were denied the right to be heard at the inquiry stage, and this breached arts 5(1) and 8(1) of the Federal Constitution.

[41] It is a settled principle of law that there is a strong presumption of constitutionality of a law, and the burden of proof is on the party seeking to establish the contrary.

(See *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 and *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566.)

[42] As regards art 5(1) of the Federal Constitution, which states 'No person shall be deprived of his life or personal liberty save in accordance with law', it is a trite principle of law that this right is not absolute. The right as enshrined in art 5(1) can be taken away by any provision of the law consistent with the phrase 'save in accordance with law' therein.

[43] There is a plethora of cases that have discussed this principle of law, and one of the cases on point is this court decision in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105. In this case, the challenge was made, among others, against s 59 of the Immigration Act 1959/63, which excludes the right to be heard, particularly on matters relating to the cancellation and revocation of an entry permit. It was argued that this provision is unlawful and unconstitutional as its infringed arts 5 and 8 of the Federal Constitution.

Section 59 states as follows:

No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or, in the case of an East

Malaysian State, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under the Act. (Emphasis added.)

[44] In rejecting the challenge to the constitutionality of s 59, this court said this:

It is clear from the authorities that the constitutional rights as guaranteed under art 5(1) of the Federal Constitution can be taken away in accordance with the law. *Hence, s 59 of the Act, which removes the audi alterem partem rule, which was duly enacted by Parliament, is valid and constitutional.* (Emphasis added.)

[45] In *Letitia Bosman v Public Prosecutor and other appeals (No 1)*, the principle of law is further emphasised as follows:

[132] The position in law on this matter is now well-settled. That *the constitutional rights as guaranteed under cl (1) of art 5 can be taken away in accordance with law* has been authoritatively established by a line of our authorities. In other words, a law that provides for the deprivation of a person's life or personal liberty is valid and binding *as long as it is validly passed by parliament.* (Emphasis added.)

(See also *Government of Malaysia & Anor v Selangor Pilot Association* [1977] 1 MLJ 133; *Bird Dominic Jude v Public Prosecutor*; *Public Prosecutor v Yee Kim Seng* [1983] 1 MLJ 252; [1983] CLJ Rep 824.)

[46] Reverting to the present case, s 265A of the CPC, in particular sub-s 265A(2) and (3), was validly passed by Parliament with plain and unambiguous provisions that authorise the absence of the accused and his counsel at the inquiry stage. Therefore, it is valid and constitutional.

[47] Next, art 8(1) of the Federal Constitution states, 'All persons are equal before the law and entitled to equal protection of the law'. In the present case, s 265A of the CPC applies to any prosecution's witnesses in a criminal trial who wish to be protected by not disclosing their identity. There is no element of discrimination in the application of the provision. Hence, as this provision is available to any prosecution's witnesses in a criminal trial, it is not discriminatory in nature, and does not infringe art 8(1) of the Federal Constitution.

[48] The same issue has been explained by this court in *Bird Dominic Jude*'s case, in the following manner:

[19] In the present case, *it is our finding that s 56A of the CJA applies to everybody*, whether a citizen or not. As long as an accused person is acquitted at the High Court, the public prosecutor can apply for a warrant under s 56A of the CJA. Section 56A of the CJA, *in our view, is not discriminatory in nature. On the test as to whether the provision of a statute is discriminatory in nature*, we would refer to the case

of *Datuk Haji Harun Haji Idris v Public Prosecutor* [1977] 2 MLJ 155; [1976] 1 LNS 19, where Suffian LP had this to say:

> With respect, we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — *if the law is not discriminatory, if, for instance, it obviously applies to everybody, it is good law* ... (Emphasis added.)

[49] In addition, we reiterate that the purpose of s 265A is for the trial judge to determine whether a witness or witnesses, and in this case, PW15 and PW16, to be protected by not disclosing their identity. The inquiry process by the trial judge does not affect the rights of an accused person to defend himself, nor touches on his guilt. The evidence of PW15 and PW16 was also presented to the defence, and these witnesses were also subjected to cross-examination by the defence. There is no miscarriage of justice or prejudicial effect to the appellant. All the steps taken in the present case were in accordance with the law, and arts 5(1) and 8(1) have not been breached.

[50] Based on the reasoning and authorities cited, we find s 265A(2) and (3) of the CPC to be a good law, valid, and constitutional.

The issue of non-compliance with s 182A of the CPC

[51] Next is the issue of failure to consider the appellant's s 112 statement (D107) and whether there was a non-compliance with s 182A of the CPC. Section 182A states:

> 182A(1) At the conclusion of the trial, *the Court shall consider all the evidence adduced before it* and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal. (Emphasis added.)

[52] Section 182A(1) requires the court to consider all the evidence adduced before it at the close of a trial in deciding whether the prosecution has proved its case beyond a reasonable doubt. In the appellant's s 112 statement (D107), the appellant's defence essentially was that the appellant did not rape PW15, and PW15 invented the story as an excuse to return home to Indonesia. Further, in D107, it stated that this could be a political ploy. Here, it is not disputed that the main contents of D107 were regurgitated in the appellant's oral evidence when he presented his defence before the court. Hence, when the court has considered his defence made orally at the close of the trial, the court had considered all the evidence adduced before it. It was not the submission of

the defence that the contents of D107 are different from the appellant's oral evidence in court. Therefore, there is no breach of s 182A in the present case.

[53] Furthermore, the appellant's defence in D107 is an exculpatory or self-serving statement, which, in itself, is not evidence of facts. The evidence of facts is the oral evidence of the appellant in court, which has been tested by cross-examination. This court in *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 explained the principle as follows:

> With respect, we are of the view that the approach was wrong. *A purely exculpatory or self-serving statement is not evidence of the facts stated*, though it may be admitted to show the reaction or attitude of the accused at the time when he made it. And in considering whether there is a case to answer, *a trial judge ought not take into account such a statement as the basis for founding an order of acquittal and discharge.* (Emphasis added.)

[54] Next, in *Public Prosecutor v Adetunji Adeleye Sule* [1993] 2 MLJ 70, Edgar Joseph Jr SCJ, also touched on the same issue in the following manner:

> In the same way, in a case where the onus lies on the accused to rebut a statutory presumption, a voluntary out of court statement by the accused and this include a cautioned statement — *which is wholly exculpatory should not be made the foundation of an order of acquittal especially at the close of the case for prosecution, since at that stage, the accused not having given evidence himself, his explanation could not be tested by cross-examination.* (Emphasis added.)

[55] Likewise, in the case of *Public Prosecutor v Chan Kim Choi* [1989] 1 MLJ 404 where the court said this:

> Such statements, when given in accordance with s 122(6) of the Criminal Procedure Code, may be admitted as part of the prosecution's evidence, but not as to the truth of the contents thereof. They are admissible on the ground, as the Privy Council has put it, that 'common fairness requires that the entirety of the statement should be admitted so as to show the precise context in which the admission was made' ... *What he says in order to exculpate himself cannot be admissible as the truth because it is self-serving and also because it is not necessarily consistent with other facts that may be established by the prosecution in the course of the trial.* Accordingly, we are not prepared to accept, in a submission of no case to answer, the contention of counsel for the defence that the explanations given by the accused in his cautioned statement were true. (Emphasis added.)

[56] Thus, what is pertinent for the court to consider is the appellant's evidence in court as his defence, which was tested in cross-examination and in the light of the totality evidence. After all, the substance of the appellant's 112 statement (D107) was similar to his oral evidence in court. Hence, there was no miscarriage of justice or prejudicial effect to the appellant in the circumstances. The requirement of s 182A of the CPC has been complied with,

and the omission to refer to the appellant's 112 statement (D107) by the court is not fatal to the prosecution's case.

[57] On the same issue, we agree with the decision of this court in *Sathya Vello v Public Prosecutor* [2022] 4 MLJ 111, which states as follows:

> There was no merit to the appellant's contention that the trial judge had failed to consider all the evidence in breach of s 182A of the CPC. *Although the trial judge had not considered the appellant's cautioned statement, it was in substance similar to the appellant's evidence in court. Hence, the mere omission to refer to the cautioned statement in the judgment was not fatal and did not vitiate the conviction as the cautioned statement added nothing further to the accused's evidence in court.* (Emphasis added.)

[58] We noted that another panel of this court has reviewed the decision in *Sathya Vello,* but the review panel issued no grounds of judgment. Be that as it may, as discussed earlier, this panel agrees with the principle of law enunciated in *Sathya Vello* on this issue.

[59] In addition, it is trite that an appeal is a continuation of a hearing, and an appellate court can review the whole evidence and make a finding even on an issue not decided by the trial judge. Thus, the appellate court in the present case can evaluate all the evidence adduced and make a finding whether s 182A has been complied with, even though the appellant's 112 statement was not mentioned in the trial judge's grounds of judgment.

[60] This court in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613 explained this principle of law as follows:

> [20] As regards the first main ground of appeal raised by the appellant, I am of the view that *the Court of Appeal has the power to review or to re-evaluate all the evidence* available as adduced by the prosecution. *The Court of Appeal is in the position to do so in the present case, even though the grounds of decision of the trial judge, as appearing in the appeal records, is found lacking in specific findings and with no reason for the finding.* In a case involving purely question of fact, the Court of Appeal is free to determine whether or not various findings of the trial court are correct (see *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122). In the present case, even though the Court of Appeal took the view that the High Court judgment was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and how it had implicated the accused. *There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on the evidence adduced from the witnesses called by the prosecution as appearing in the appeal records.* I am therefore of the view that the Court of Appeal did not err on this issue. (Emphasis added.)

[61] Likewise, in the present case, the re-evaluation of evidence by the appellate court on all the evidence in the records of appeal disclosed that at the end of the case, all the evidence had been considered by the trial judge, even without mentioning the appellant's 112 statement (D107) in his grounds of judgment. Here, the Court of Appeal found that s 182A has been complied with, and we agree with the findings of both the trial judge and the majority of the Court of Appeal.

The credibility of PW15

[62] Regarding the credibility of PW15, it is also a settled principle of law that the credibility of a witness is best assessed by the trial judge who has the audio-visual advantage and is able to observe the demeanour of a witness. Unless the finding on the credibility is plainly wrong and not supported by evidence, the appellate court should be slow in disturbing the finding. Further, it is trite that it is not the function of an appellate court to make primary findings of fact. Discrepancies in the evidence of a witness, if not material, should not affect the witness's credibility.

[63] This court in *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1 has succinctly discussed this issue on the credibility of a witness as follows:

> [9] The approach to be taken by an appellate court when dealing with a trial court's assessment of the credibility of a witness is well-established by high authorities. *The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such findings of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding. Discrepancies will always be found in the evidence of a witness, but what a judge has to determine is whether they are minor or material discrepancies. It would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. In the final analysis, it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject.* (Emphasis added.)

(See also *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 (FC); and *Md Zainuddin bin Raujan v Public Prosecutor* [2013] 4 MLJ 596 (FC).)

[64] In the present case, the trial judge found that PW15 was a credible witness based on the assessment of her demeanour, her conduct, and tested it against the totality of corroborative evidence before the court. There were also concurrent findings on the credibility of PW15 by the trial judge and the majority of the Court of Appeal. Further, the contradictions of PW15's evidence or her conduct raised by the defence were not material that affect

PW15's credibility. As such, there is no reason for this court to disturb the said findings.

[65] In assessing the credibility of PW15, the trial judge not only took into consideration that PW15's evidence was not shaken during cross-examination but also considered other evidence before the court that enhanced PW15's credibility, including corroborative evidence.

[66] On this issue, counsel for the appellant submitted that PW15's conduct after the incident does not reflect the conduct of a rape victim. PW15's conduct, including cleaning herself in the bathroom, mopping the said appellant's semen, washing the mop, and looking calm when she met PW6, PW7, and PW23, was submitted, is not the conduct of a victim who has been raped.

[67] In this regard, PW15's conduct has to be analysed in the context of the totality of evidence. Firstly, PW15 testified that earlier, she had been warned by the appellant that PW15 must not inform the appellant's wife (DW2) about his misconduct against PW15, or if not, they would die and PW15 would die first. Further, PW15 conducts when she telephones PW3 thrice in a state of panic and crying, informing him about the rape incidents, and crying when informed PW16 before lodging the police report, supported the conduct of a rape victim. The forensic evidence by PW5 also shows fresh tears of her hymen that are consistent with PW15's story of being raped.

[68] Next**,** the issue of the unexplained landline from which PW15 made the three calls to PW3 was raised by the defence. It was contended that the calls were not from the landline of the appellant's house, as testified by PW15. We find that this contradiction is not material, having considered the totality of the evidence. The material evidence here was the content of the calls, and PW3 actually received the three calls. Thus, the said contradiction does not affect PW15's credibility.

[69] Counsel for the appellant further raised the issue that PW15 did not inform her mother about the rape when she met her at the Indonesian embassy two months after the incident. However, this has been explained in her re-examination, when she said that she did not inform her mother because she felt guilty and did not want her mother to be worried. In her words, PW15 said this, 'saya rasa bersalah dan saya takut ibu saya khuatir'. The explanation is reasonable and not something inherently incredible.

[70] Counsel for the appellant also raised the issue that no DNA of the appellant was found on the mop that was used to mop the appellant's semen in the said room. The evidence before the court was that PW15 had mopped the

sticky liquid found on the floor after the incident with a mop that was already soaked with soap. The existence or non-existence of the appellant's DNA on the said mop is subject to various factors that could not be conclusively determined by the forensic expert. In any event, the DNA evidence is only corroborative in nature and would not affect the prosecution's case if there is sufficient evidence to prove the element of the offence beyond a reasonable doubt. We are also of the view that the non-existence of the appellant's DNA on the mop does not affect PW15's credibility, in the light of the totality of evidence.

[71] The corroborative nature of DNA evidence has been explained, among others, in the case of *Ng Mee Yee & Anor v Public Prosecutor* [2025] 3 MLJ 883; [2025] 6 CLJ 343; *Lingeswaran a/l Ambalakhan v Public Prosecutor* [2025] MLJU 1932; [2025] CLJU 1473; *Francis Abuchi Odike v Public Prosecutor* [2015] MLJU 816; [2015] 1 LNS 928; and *Lee Gee Hian v Public Prosecutor* [2022] 1 MLJ 755; [2021] 1 LNS 1895.

[72] In the circumstances, we find no reason for this court to disturb the findings of the trial judge and the majority of the Court of Appeal in their findings on the credibility of PW15.

The corroboration of PW15's evidence

[73] The next pertinent issue raised in the present case is the corroboration of PW15's evidence. It was submitted by counsel for the appellant that PW15's evidence was not corroborated by any independent evidence, and PW15's evidence itself is not credible. Therefore, the findings by the trial judge and the majority of the Court of Appeal that PW15's evidence was corroborated by other evidence are an appealable error.

[74] It is a trite law that the corroborative evidence must itself be credible. The essence of corroborative evidence, among others, is that one credible witness confirms another credible witness, which will provide credible evidence.

(See *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144 (FC); *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134; and *Director of Public Prosecutions v Kilbourne* [1973] 1 All ER 440.)

[75] However, corroborative evidence is not restricted to oral evidence of an independent witness only, but also by established facts as explained in the case of *Brabakaran v Public Prosecutor* [1966] 1 MLJ 64 (FC) as follows:

> Corroborative evidence is not necessarily restricted to the oral evidence of an

A independent witness. *Corroboration can equally well be afforded by established facts, and the logic of established facts sometimes speaks even more eloquently than words.* (Emphasis added.)

B **[76]** Circumstantial evidence can also amount to corroboration if the circumstantial evidence is credible and supports the evidence of another witness. In *Tang Kin Seng v Public Prosecutor* [1996] SCD 174; [1996] 3 SLR(R) 444, Yong Pung How CJ quoted the case of *R v Hills* (1987) 86 Cr App Rep 26, which states:

C 55 ... *Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence*, each innocuous on its own, which together tend to show that the defendant committed the crime. For example, in a rape case, where the defendant denies he ever had sexual intercourse with the complainant, it may be possible to prove (1) *by medical evidence that she had had sexual intercourse within an hour or so prior to the medical examination, (2) by other independent evidence that the* D *defendant and no other man had been with her during that time*, (3) that her underclothing was torn and that *she had injuries to her private parts*. None of these items of evidence on their own would be sufficient to provide the necessary corroboration, but the judge would be entitled to direct the jury that if they were satisfied so as to feel sure that each of those three items would had been proved, the E combined effect of the three items *would be capable of corroborating the girl's evidence.* (Emphasis added.)

Chief Justice Yong Pung How further commented as follows:

F [56] This is but common sense. The only surprise is that it took so long for it to be recognised. *If a conviction for an offence can be secured solely on circumstantial evidence, there is no reason at all why corroboration cannot also be based purely on circumstantial evidence.* The contrary position would lead to the absurdity that the prosecution's case is stronger if the victim is unable to give evidence. (Emphasis added.)

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(See also *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143b.)

[77] In a sexual offence case, such as a rape offence, although there is no legal H requirement for corroborating evidence, it is prudent to have corroborative evidence supporting the evidence of the victim. The corroboration will enhance the credibility of the victim and assist in the establishment of the prosecution's case beyond a reasonable doubt.

I (See also *Din v Public Prosecutor* [1964] 1 MLJ 300 (FC).)

[78] In the present case, besides there were concurrent findings that PW15's evidence is credible, there is ample corroborative evidence supporting PW15's evidence.

[79] A day after the incident, PW15, on 8 July 2019 at about 11am, made a phone call to Riki Sapari ('PW3'), an employee with 'Bahagian Tenaga Kerja KBRI', asking him to rescue her as she had been raped by her employer. During the call, she was crying and sounded panic, and repeatedly said 'tolong selamatkan saya' (please save me). She called PW3 three times, where she asked to be rescued, and PW3 then informed her to go to the nearest police station.

[80] Next, PW16 (protected witness) testified that on 8 July 2019 at about 1.15pm, PW16 was on the way home driving a car when PW15, who was at the side of the road, waved at him. When PW16 stopped the car, he saw PW15 running to the car and then asked PW16 to send her to the Indonesian Embassy in Kuala Lumpur. PW16 then offered to send her to the taxi stand at Amanjaya Bus Station. Thereafter, PW15 informed PW16 that she had been raped by her employer and started crying. PW16 then brought her to the Jelapang Police Station to lodge a police report.

[81] The defence witness, Mohamad Rusdi ('DW3'), further corroborates PW15's evidence when DW3 testified that after the incident, PW15 told him, while crying, that she wanted to go back to Indonesia as there were 'bad people' at her place.

[82] The evidence by PW3, PW16, and DW3 showed that PW15 was in a state of distress when she telephoned PW3 thrice, when PW16 met her and later brought her to the police station, and when she met DW3. This evidence of distress amounts to corroboration of PW15's evidence that she has been raped.

[83] In the *Tang Kin Seng* case, the court acknowledged that evidence of distress amounts to corroboration. The court made the following observations:

> 88 The same applies for evidence of distress. In *R v Redpath* (1962) 46 Cr App R 319, it was held that in certain circumstances, *evidence of distress may amount to corroboration.* In that case, the appellant was seen by a complete stranger to have approached a child and later driving off in a car. The child was observed to be in a very distressed condition shortly afterwards. The child did not know that she was being observed. *Lord Parker CJ held that in those circumstances, the child's distress could amount to corroboration.*
>
> ...
>
> 90 *R v Ramesh Chauhan* (1981) 73 Cr App R 232 is a case falling between the two extremes, and thus useful. In that case, the accused was left alone in an office with the complainant. *The complainant was seen by a colleague running out of the office into the toilet, crying and in an upset state. The colleague followed the complainant in, whereupon the complainant made an immediate complaint to her that she had been molested by the accused.* The accused gave evidence that nothing happened in the room and that when the complainant left the room, she appeared normal. The

A prosecution thought that there was no corroboration, but *the recorder disagreed and directed the jury that the distressed state of the complainant could amount to corroboration if they thought that the distress was not feigned and that the complainant was not imagining things. The Court of Appeal held that the recorder was right.*

B 91 Provided that the pitfalls are kept in mind, *there is no reason why the complainant's distress cannot be a weighty piece of evidence in the right circumstances* ... (Emphasis added.)

C **[84]** Likewise, in the present case, the evidence of PW3, who received three phone calls from PW15 during which she was panicked and crying, and informed him that she had been raped, the evidence of PW16, who saw PW15 waving and running after PW16's car, and later cried when she informed him that she had been raped, and the evidence of DW3 that PW15 while crying informed him that there was 'bad people' at her work place, were evidence of distress that corroborated PW15's evidence.

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[85] Next, PW15 lodged a police report ('P52') on 8 July 2019, at about 2.12pm, and the substance of the report was that she was raped by the appellant on 7 July 2019 at about 9pm.

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[86] Exhibit P52 is PW15's former statement made to the police, an authority legally competent to investigate the facts. It has a corroborative nature in light of other evidence adduced in the present case. Section 157 of the Evidence Act 1950 states:

F *In order to corroborate the testimony of a witness, any former statement made by him*, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or *before any authority legally competent to investigate the fact*, may be proved. (Emphasis added.)

G **[87]** This court in *Lim Guan Eng v Public Prosecutor* [2000] 2 MLJ 577, has explained the application of s 157 as follows:

It is our view that *under s 157, a former statement made by a witness is admissible in order to corroborate his testimony.* The weight of such a statement for the purpose of corroboration depends on the facts of a particular case. This view is supported by a long line of decided cases. In *Liew Wah Ming v Public Prosecutor* [1963] 2 MLJ 82, Thompson CJ, said at p 84:

H

I *Section 157 is clear and unambiguous, and there can be no doubt that in the circumstances laid down in that section, a former statement made by a witness is admissible to corroborate his testimony and with the object of showing consistency. But the weight or value of such a statement as corroboration must always be a question of fact* ... While, therefore, the former statement of an accomplice or ... of a child is admissible to corroborate his testimony and to indicate consistency, the weight to be attached to it must vary with the facts of each case. (Emphasis added.)

(See also *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 (FC); *Public Prosecutor v Samsul Kamar bin Mohd Zain* [1988] 2 MLJ 252; and *Rex v Velayuthan* [1935] 1 MLJ 277.)

[88] Reverting to the present case, P52 was lodged by PW15 a day after the incident, and its contents are consistent with her testimony that she was raped by the appellant in the house on 7 July 2019. There is also other oral and documentary evidence that corroborates PW15's evidence in relation to the rape incident. Thus, P52 is in fact a piece of corroborative evidence in this case.

[89] Apart from this, in PW15's personal diary ('P20A'), PW15, among others, wrote 'Aku benci diriku' (I hate myself), and when asked in court what she meant by these words, PW15 said that she feels 'kotor, jijik dan hina' (dirty, disgusting, and humiliated). This is also evidence of distress that corroborates PW15's evidence, and P20A is her former statement that is consistent with the feelings of a rape victim. In the *Lim Guan Eng* case, Corporal Stanley typed a written note about the appellant's speech ('P6'), and this written note was also accepted as corroborative evidence under s 157 of the Evidence Act 1950.

[90] Further, there was also the evidence from the CCTV presented by the prosecution. The CCTV showed that at the material time when the incident happened, the appellant's wife ('SD2') and their son, Bryan, went out to McDonald's, and the appellant's friend, Leong Yeong Wai ('PW22'), had left the house earlier than SD2. Thus, the appellant was alone in the house with PW15, and this provides the opportunity for the appellant to commit the offence.

[91] On this issue, we noted that evidence of opportunity *per se* cannot amount to corroboration of PW15, but with other circumstantial evidence, as available in the present case, it would lead to a reasonable inference that the offence had happened as testified by PW15. In *Ridley v Whipp* (1916) 22 CLR 381, Griffith CJ explained:

> In the case of *Dawson v M, Kenzie* (1908) SC 698, the Court of Sessions in Scotland held that the proof of opportunity of intercourse may be corroborative evidence if of such character as to establish suspicion. *In my opinion, when reliance is placed upon proof of opportunity, that proof must be supplemented by proof of circumstances of such a nature as to lead to the inference that it was probable that advantage would be taken of the opportunity.* It is impossible to define in advance what circumstantial evidence would be sufficient for that purpose. (Emphasis added.)

[92] In the present case, besides other corroborative evidence, there is also admissible medical evidence of PW5 that corroborates the evidence of the offence of rape against PW15.

[93] The medical evidence adduced in the present case was given by Dr Nila Wati ('PW5'). On 9 July 2019, PW5 examined PW15 at Ipoh General Hospital and found that there were fresh tears at 6 to 8 o'clock of the hymen and also abrasions at 2 o'clock which occurred less than 72 hours from the time of the examination. PW5 also did not rule out that the tears could be caused by penile penetration. This piece of medical evidence corroborates the evidence of PW15 that she was raped two days before the medical examination by PW5. Medical evidence corroborates that the evidence of rape victims has been acknowledged in a plethora of cases, such as in *Public Prosecutor v Yee Kim Seng* and *Augustine Foong Boo Jang v Public Prosecutor* [1990] 1 MLJ 225.

[94] Counsel for the appellant submitted that if it is true that the appellant was left alone with PW15, it was only for about 10 to 13 minutes, and it is incredulous that the appellant would run the risk of being caught for raping PW15, knowing that his wife could return from McDonald's. Be that as it may, the actual incident of rape is possible to happen within the duration of 10 to 13 minutes, in light of the incident that was relayed by PW15 in this case. Moreover, as testified by PW15, the appellant had sexually harassed her a few times in the appellant's house before. The rape incident on 7 July 2019 was not the appellant's first sexual misconduct against PW15.

[95] In the circumstances, we agree with the concurrent findings of the High Court and the majority of the Court of Appeal that PW15's evidence was sufficiently corroborated by other evidence mentioned earlier.

The consideration of the appellant's defence

[96] Having read the notes of proceedings and the grounds of judgment of the trial judge from pp 66–100 and pp 4–6 of the majority of the Court of Appeal, we find that the appellant's defence has been sufficiently considered by the trial judge and the majority of the Court of Appeal. The trial judge has considered in detail the defence put forth by the appellant as reflected in paras [106]–[111] of the grounds of judgment, and also the defence's witness, SD2, as mentioned in para [112] of the grounds of judgment. Further, the trial judge has analysed the defence in light of the totality of evidence as reflected in paras [113]–[126] of the grounds of judgment. The trial judge also ruled out that PW15 invented the story to enable her to return to Indonesia, or the existence of a political ploy. Thereafter, the trial judge concluded that the appellant's defence was an afterthought and failed to raise a reasonable doubt on the prosecution's case.

[97] The majority of the Court of Appeal has also assessed the defence's case in its grounds of judgment at paras [10]–[12] and [29]–[36], and thereafter,

concluded that the conviction by the trial judge is safe and, as such, affirmed the conviction.

[98] On the same issue, there were concurrent findings of the trial judge and the majority of the Court of Appeal that the appellant had failed in his defence to raise a reasonable doubt on the prosecution's case. We agree with these findings as the defence has failed to answer the evidence presented by the prosecution. It is trite that a credible defence, among others, is a defence that answers the evidence of the prosecution.

(See also *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603; *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 3 CLJ 109; and *Azhar bin Lazim v Public Prosecutor* [2012] 5 MLJ 1; [2012] 1 LNS 262.)

[99] In the present case, the appellant's defence, which includes the appellant's testimony and other defence witnesses, does not raise a reasonable doubt as to the truth of the prosecution's evidence or the accused's guilt.

The shoddy and incomplete investigation

[100] Based on the totality of evidence presented to the court, and the analysis discussed earlier, we agree with the concurrent findings of the trial judge and the majority of the Court of Appeal that the elements of the charge under s 376(1) of the Penal Code against the appellant, that there was penetration and without PW15's consent, have been proven beyond a reasonable doubt. Therefore, the submission that the investigations by PW23 were shoddy and incomplete under the circumstances is untenable.

The admission of additional evidence

[101] On the issue of the admission of the additional evidence, the defence called an Indonesian lawyer, Pathurrahman ('SDT1'), who testified that PW15 had come to his office on 20 May 2024 for legal advice. PW15 then informed him that her evidence in the rape trial against the appellant was not true, and PW15 which to retract her evidence. PW15 has concocted the evidence to enable her to return home to Indonesia before the expiry of her contract of service.

[102] Pathurrahman prepared a written statement ('SDT1'), which also contained a letter of statement of PW15 made by Pathurrahman, allegedly upon PW15's instruction. In the written statement ('SDT1'), it exhibited, among others, a letter of authorisation by PW15 to Pathurrahman. ('SDT1(D)'). Both SDT1 and SDT1(D) were allegedly signed by PW15. In

the letter of statement ('SDT1'), PW15 purportedly states, in substance, that her evidence in the trial against the appellant, that she was raped by the appellant, was not true, and she made up the story to enable her to return home to Indonesia before the expiry of her contract period.

[103] On this issue, first, a witness may testify on relevant facts based on his personal knowledge or perception and not of others. The rule against hearsay evidence has been codified in s 60 of the Evidence Act 1950 and further explained in the landmark case of *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220 (PC), where it states:

> In ruling out peremptorily the evidence of conversation between the terrorists and the appellant, the trial judge was in error. *Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.* The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships, statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes. (Emphasis added.)

[104] For ease of reference, s 60 of the Evidence Act 1950 is as follows:

> 60(1) Oral evidence shall in all cases whatever be direct, that is to say —
>
> (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
>
> (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
>
> (c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
>
> (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.
>
> (2) The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of the treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.
>
> (3) If oral evidence refers to the existence or condition of any material thing, including a document, the court may, if it thinks fit, require the production of that

material thing or the document for its inspection.

[105] It is not disputed that the intention of the defence to put in the additional evidence, SDT1 and other related documents, is to prove the truth of the contents therein. Otherwise, it is meaningless to tender the statements to show that the statement was made to Pathurrahman and not the truth of its contents, which clearly would have no impact on the existing evidence presented during the trial. Pathurrahman has no personal knowledge of the rape incident that occurred on 7 July 2019 in Ipoh, Malaysia. Thus, his state of mind, in the circumstances of this case, has no evidential weight that can assist the court other than, if accepted, forwarding an alleged statement made by PW15 for the court's consideration.

[106] As the purpose of adducing the additional evidence in the present case is to prove the truth of the contents of the statements, it clearly amounts to documentary hearsay, and the oral evidence of Pathurrahman informing what PW15 had told him is also hearsay evidence, which is inadmissible.

(See *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220 (PC); *Teper v The Queen* [1952] AC 480; *Ratten v R* [1972] AC 378 (PC); *Myers v Director of Public Prosecutions* [1964] 2 All ER 881; *Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200 (FC); and *Beh Heng Seong v Public Prosecutor* [1972] 2 MLJ 190.)

[107] In any event, our law provides exceptions to this hearsay evidence in s 32(1) of the Evidence Act 1950. A statement of a person who is not called as a witness is admissible if the prerequisites of s 32(1) are strictly proved. The prerequisites under s 32(1) are where the maker is dead, the maker cannot be found, the maker is incapable of giving evidence, or the procuring of the maker's attendance will result in unreasonable delay or expense.

(See also *Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200 (FC).)

[108] The requirement to prove strictly the pre-requisite of s 32(1) has been emphasised in the *Sim Tiew Bee* case as follows:

> In the case of *Chaincal Singh v Emperor*, evidence given by a witness in a judicial proceeding was to be used under s 33 of the Indian Evidence Act in a subsequent judicial proceeding on the ground that the witness was incapable of giving evidence. It was held by Lord Goddard that:
>
> > Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, *that fact must be proved, and proved strictly* ... (Emphasis added.)

[109] Section 32(1) of the Evidence Act 1950 states:

> 32(1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> ...
>
> (c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, *if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages*; (Emphasis added.)

[110] In the present case, the defence is relying on the second limb of s 32(1)(c), where the statement, if true, would expose PW15 to criminal prosecution.

[111] Having perused the evidence of Pathurrahman, the written statements ('SDT1'), and other related documents, there is nothing to establish the fact that PW15 refused to come to Malaysia to retract her evidence for the reason that she would be exposed to criminal prosecution. Pathurrahman, being a lawyer, could easily advise her on this, and to put the said reason in writing, if it was the true reason she refused to come to Malaysia. Pathurrahman, in his oral evidence, did not say anything about PW15 being afraid of being exposed to criminal prosecution in Malaysia for her conduct in retracting her evidence in the rape trial. Pathurrahman was also not asked by the defence on this pertinent reason when he testified in court before the trial judge in Malaysia. In the circumstances, we find that the prerequisites of s 32(1)(c) have not been strictly proved.

[112] Further, on this issue of admission of new evidence, one of the main elements to be considered by the court is that the evidence sought to be admitted must be credible.

(See also *Mohamed bin Jamal v Public Prosecutor* [1964] 1 MLJ 254 (FC).)

[113] Reverting to the present case, having considered the oral evidence and the documentary evidence adduced to support the admission of the additional evidence, the trial judge made a finding of fact that the contents of the statement ('SDT1') were not credible on the following grounds:

(a) in SDT1, it states that PW15 had worked with the appellant from 7 May 2019 until May 2021, which was about two years. However, based on the oral and documentary evidence presented during the rape trial against the appellant, it was proven that PW15 only worked with the

appellant for two months, that was from 8 May 2019 until 7 July 2019; and

(b) the alleged signature of PW15 on SDT1 and SDT1(D) compared with her signature on the documents tendered in court during the rape trial shows a striking difference. The signature on SDT1 and SDT1(D) was compared with P31(Tawaran Pekerjaan) and P32B (Perakuan Pembantu Rumah Asing). As such, the trial judge made a finding of the possibility that the signature on SDT1 and SDT1(D) were not the signatures of PW15.

[114] Based on the evidence in the admission of additional evidence proceedings, the totality of evidence in the present case and the relevant laws as discussed earlier, we agree with the finding of the trial judge in not accepting the additional evidence, SDT1 and SDT(D), on the grounds of hearsay, not credible, and not having fulfilled the requirement of s 32(1) of the Evidence Act 1950 for its admission as evidence.

CONCLUSION

[115] In conclusion, it is our unanimous decision that the conviction against the appellant is safe and hereby affirmed. We also find that the sentence imposed by the majority of the Court of Appeal is also appropriate and affirmed the sentence. The appellant's appeal is hereby dismissed.

Appellant's appeal dismissed; conviction affirmed; sentence imposed by Court of Appeal affirmed.

Reported by Dzulqarnain Ab Fatar